85-661

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DOROTHY A. RUSSELL, et al.
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVID M. WILLIAMS
Counsel of Record
113 Court Street
Chestertown, Maryland
21620
(301)778-4096

85 pp

QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the United States of America may constitutionally deny a citizen her protected liberty right to full and adequate personal injury damages which are guaranteed to her as being measured by state law?

2. Did the court of appeals err in holding that the United States of America may consitutionally deprive a citizen of her constitutionally and statutorialy guaranteed liberty right to full and adequate personal injury damages by holding that the district court was not clearly erroneous in the manner it apportioned damages?

LIST OF ALL PARTIES

1. DOROTHY A. RUSSELL, individually

2. HOME INSURANCE COMPANY, to the use of Dorothy A. Russell

3. ALBERT G. RUSSELL, as husband of Dorothy A. Russell

PETITIONERS (PLAINTIFFS/APPELLANTS below)
(CROSS-APPELLEES below)

4. UNITED STATES OF AMERICA
RESPONDENT (DEFENDANT/APPELLEE below)
(CROSS-APPELLANTS below)

J. Frederick Motz, Esquire
United States Attorney
Robert B. Green, Esquire
Assistant United States Attorney
101 W. Lombard Street
Baltimore, Maryland 21201
(301)539-2940

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS AND OPINIONS

UNPUBLISHED OPINION - United States Court of Appeals for the Fourth Circuit, Murnaghan, Ervin and Sneeden, Circuit Judges, Decided July 25, 1985

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JUDGMENT - United States District Court for the District of Maryland, Miller, District Judge, Dated November 21, 1983

FINDINGS OF FACT AND CONCLUSIONS OF LAW United States District Court for the District of Maryland, Miller, District Judge, Ordered November 16, 1983

GROUNDS FOR JURISDICTION

Petitioners brought this action pursuant to 28 U.S.C. § 1346 and 28 U.S.C. 2671, et seq. Petitioners thereafter appealed the decision of the district court to the United States Court of Appeals for

for the Fourth Circuit, pursuant to 28 U. S.C. § 1291. She petitions for certiorari to this Court pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2674 : Liability of the United States:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the laws of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries for whose benefit the action was brought, in lieu thereof.

The petitioners, Dorothy A. Russell, individually and to the use of the Home Insurance Company, and Albert G. Russell, her husband, brought an action against the United States of America (hereinafter respondent) pursuant to Title 28 U.S.C. § 1346 and § 2671, et seq., in the United States District court for the District of Maryland on February 11, 1982.

The petitioners' claims were bottomed on traditional substantive common law principles relating to the duty owed to business invitees and damages under Maryland law. Petitioners alleged that on September 14, 1979, they had by invitation ventured onto the Patuxent Naval Air Station at Patuxent River, Maryland, where employees of the respondent committed negligent acts which resulted in the petitioner falling and sustaining serious

injuries.

The case was tried before District Judge James R. Miller, Jr., on October 27, 1983.

The relevant evidence showed the petitioner, Dorothy A. Russell was born February 12, 1931 and was forty-eight years old at the time of her fall on September 14, 1979. At the age of sixteen, petitioner went to work as a waitress and in 1962 married her present husband, Albert G. Russell. She thereafter worked as a packer for a moving company, and in 1963 or 1964 left the employ of that company to work for the Hilldrup Transfer and Storage Company. From 1964 until the day of her fall, she continuously worked as a packer for Hilldrup. Petitioner had no other skills or training for employment.

Prior to the accident in question, petitioner had no illnesses, medical problems or complaints of pain, and lost practically no time from work except for an occasional cold and to give birth to seven children. She was not without minor medical problems. She had high blood pressure, and occasional arthritic symptoms in her right knee. The only medication she took was for high blood pressure. She also had an admission to a hospital in July of 1979 for the removal of a lipoma in her back. The records and x-rays of the hospital revealed that the petitioner had minimal apophseal joint arthritis in the back between L3, 4 and 5, that she did not make complaints of back, neck or leg pain, and was otherwise asymptomatic.

On September 14, 1979, petitioner,

pursuant to her lawful employment, went to Quarters Z on the Patuxent Naval Air Base Station near Patuxent, Maryland, for the purpose of unpacking the moving boxes of a naval officer. After working for several hours, petitioner stepped on a screwdriver left of the step by employees of the respondent, falling and striking her back against a doorway. She then fell on her knees and across a box, striking her left breast. She immediately felt pain all over her body. She continued working because she knew the job had to be completed, finishing at approximately 4:30 Friday afternoon. Her discomfort continued into the following weekend and into Monday and Tuesday upon returning to work. Finally the pain in her legs, back and neck became unbearable and she stopped working. She was treated

by her family physician on Wednesday, September 19, 1979 for her aches and pains. While being treated with muscle relaxants she discovered a lump on her breast in late October and was admitted to the hospital. While in the hospital, she continued to have pain in her legs, back and neck, which she was told was caused by a sprain in her back. After recovering from her November, 1979 mastectomy, in March, 1980, petitioner came under the care and treatment of an orthopedic surgeon for her neck, back and leg pain. At that time the petitioner weighed approximately 220 pounds, which she eventually reduced to 180 pounds in order to facilitate treatment of her problems. Her complaints of pain gradually worsened, and she had episodes when her left leg gave away on her. Ini-

tial treatment was conservative. She was prescribed physical therapy three times a week which lasted for over three years. She was also prescribed various medicines for pain. Her condition rendered her unable to drive, except when absolutely necessary, unable to sleep, and resulted in a need for members of her family to stay with her constantly in order to drive for her and do her household chores.

In April, 1980, petitioner had an arthrogram performed on the left knee which resulted in surgery in May. She returned home from the hospital and was ambulatory with crutches for two months, and has walked with a cane since. She presently takes Motrin four times every day which helps to relieve her pain, but which makes her drowsy.

Dr. Mirza Baig is a medical doctor licensed to practice orthopedic medicine in the State of Maryland. He testified he first saw the petitioner on March 31, 1980. She complained of pain in the low back, neck, and left knee since her fall in September, 1979. His examination revealed muscle spasm in the low back and neck, and swelling of the left knee with a laxity of the left knee ligaments. He diagnosed a lumosacral spain, cervial sprain, and an internal derangement of the left knee due to torn meniscules, all proximately and directly caused by the accident. He administered an injection of cortisone and xylocaine in the hip for the low back pain and prescribed Norgesic Forte for her neck and knee. He next saw petitioner on April 4, 1980 when her complaints and his findings were the same.

On April 18, when she next saw him, petitioner reported difficulty in sleeping, walking and negotiating stairs. She had pain in her back and left knee, and complained that her knee was giving away with popping sounds. His examination revealed increased heat and tenderness over the knee and her back showed marked muscle spasm and tenderness over L4, 5 and S1. X-rays taken of the left knee on that date showed a formation of osteopytes and arthritic changes. X-rays of the back showed osteoarthritis. After taking a history that she had been free of pain and other symptomology prior to her accident of September, 1979, Dr. Baig concluded she had a pre-existing arthritic condition in the back which was worsened by the accident. He prescribed Nalfon and ordered an arthrogram of the

left knee. A visit on May 2 revealed the symptoms gradually getting worse with the left knee giving way on ambulation. The arthrogram revealed a suspicion of a tear in the lateral capsule in the synovioum. Surgery was performed on May 7, 1980, revealing no tear in the knee synovioum, but rather, arthritic changes in the knee with degenerated menisci and osteophytes. The arthritic knee was demonstrated by an eburnation of the articular cartilage. The surgery involved removal of the spurs and cleaning the knee joint. Dr. Baig testified that the bill for this surgery was fair and reasonable in the amount of $1010.00 and that the hospital bill was fair and reasonable in the amount of $1876.19, and that both were necessitated by the accident of September 14, 1979.

Petitioner was followed post-operatively on May 23, 1980, at which time her pain had improved. Dr. Baig found minimal effusion in the left knee joint and marked weakness of her quadracep muscles. Quadracep exercised were prescribed as well as Nalfon, 600 milligrams, three times a day, and she was advised to wear a knee immobilizer.

On her next visit, on June 12, petitioner complained of sleepless nights and pain in her knee, at which time Naprosyn, 250 milligrams twice daily was prescribed. She saw Dr. Baig regularly thereafter, continuing to have pain in her left knee, back and neck. She demonstrated problems with her back and neck, manifested by muscle spasm and tenderness in those areas. Her pain gradually became more severe and exercises only gave her mini-

mal improvement.

On December 5, 1980, x-rays of the left knee revealed an angulation of five degrees resulting in diminished joint space in the medial compartment, and an opening up of the lateral compartment. She now had severe arthritis of the left knee with the articular cartilage narrowed down, resulting in "bone on bone". Dr. Baig opined at trial that the trauma to the left knee in the accident of September 14, 1979 was a significant factor in causing this condition. He then opined that prior to the accident the petitioner had a dormant pre-existing arthritic condition in her knees, back and neck, and the back and left knee were aggravated or worsened by the trauma of the accident.

On May 6, 1981 a second arthrogram was performed which revealed she now had

severe hyptrophic-degenerative arthritis. She continued to have symptoms in her neck and back as well as her knee. She still had difficulty sleeping and ambulating with crutches. As of May 26, she was receiving physical therapy to the low back in the form of heat, traction and massage, and was taking Motrin to help relieve her symptoms. A Patellar compression test to the left knee showed positive, and tenderness was noted over the inside, with some deformity. She had an antalgic gait and favored the left knee through the use of a crutch on the right side.

Dr. Baig last saw the petitioner in June of 1983. His bill for treating her knee, back and neck for the three years was accepted and noted by the district court as proper in the amount of $5,266.00. He testified as an expert in orthopedic

medicine, without objection from the respondent, that petitioner's condition of the left knee, back and neck, as well as the medical management thereof were permanent in nature and all proximately caused by the accident of September 14, 1979. Dr. Baig stated his opinion that the petitioner's injuries kept her permanently and totally disabled.

The witness, John Thomas Diller was produced by the petitioner as an expert to testify concerning her ability to be gainfully employed. This witness has a specialty in the field of vocational rehabilitation and is a supervisor of vocational rehabilitation counselors with the State of Maryland. The respondent had no objection to the witness' testimony for this purpose. He testified that petitioner's medical problems caused by

the accident, combined with the medical management thereof rendered her incapable of ever returning to gainful employment. This testimoney was received in evidence without objection by the respondent.

Albert G. Russell, husband of the petitioner testified that the only medical problem he knew his wife had prior to September 14, 1979 was high blood pressure. Thereafter, he generally described how the injuries sustained in the accident affected their marital relationship.

The respondent produced it's expert witness in the field of orthopedic medicine, Dr. John T.T. Johnson. he testified that Dr. Baig was a qualified orthopedist and an honest and honorable person. Dr. Johnson examined the petitioner one time for the purpose of trial testimony on behalf of the respondent. He also re-

viewed the medical records before stating his opinion, but acknowledged he did not review any of the records of her condition prior to the date of the accident. His findings were somewhat consistent with those of Dr. Baig. She had chronic arthritic problems. He testified that her condition could be an aggravation of pre-existing arthritic conditions caused by the trauma of her fall. He then assessed her anatomical disability at thirty to thirty-five percent to the left knee and fifteen to twenty percent to her lower back.

Subsequent to trial, the district court determined that as a result of the accident of September 14, 1979, the petitioner had a debilitating condition of the back, neck and left knee, and debilitating pain in the neck, back and left

knee. The court further found that petitioner had not worked since September 19, 1979 and found her to be totally disabled. The district court held the case sub curia until November 21, 1983, when it filed Findings of Fact and Conclusions of Law and entered judgment in favor of the petitioners Dorothy A. Russell and the Home Insurance Company for $26,661.34, and Dorothy A. Russell and Albert G. Russell for $5,000.00.

The court found factually that the employees of the respondent were negligent on September 14, 1979, that the petitioner was free of contributing negligence, and that she had pre-existing arthritic conditions which were aggravated by her fall in the accident of September 14, 1979.

The district court then proceeded to establish a formula for apportioning dam-

ages for the petitioner by using a discretionary number of ten percent of the injury attributable to the respondent for its negligence in causing the accident. This was based upon the premise that the petitioner had pre-existing arthritic conditions to numerous parts of her body which were aggravated or worsened only by ten percent attributable to the accident.

The medical expenses directly attributable to the accident were found to be in the total amount of $8,152.19, of which the court ordered ten percent, or $815.19 payable by the respondent as past medical expenses. The court, having found the petitioner to be permanently and totally disabled discounted the present value of her life work expectancy to $58,461.47, and ordered that the respondent pay only ten percent of said amount, or $5,846.15.

The court then awarded the petitioner ten percent for her past, present and future pain and suffering in the amount of $10,000.00, ten percent for impairment of the body in the amount of $10,000.00 and ten percent for damage sustained to the marital relationship in the amount of $5,000.00.

The petitioners timely filed a motion to amend this judgment on November 23, 1983, accompanied by a memorandum designating specific Maryland authorities setting forth that damages are not apportionable under Maryland law. It brought to the attention of the court its failure to award damages to the petitioner from the date of the accident to the date of trial in the amount of $34,980.00, and also specifically requested the court to correct or increase the amount of the judg-

ment by not apportioning damages.

The district court filed Supplemental Findings of Fact and Conclusions of Law. The court found factually among other things that the petitioner's neck and back problems did not develop to a substantial degree until after the accident of September 14, 1979. The court then found the petitioner's inability to work as a result of her accident did not commence until January 1, 1980, and found that from January 1, 1980 to the time of trial the petitioner lost approximately 203 weeks o work. holding she would have earned $33,495.00. They apportioned the award by holding approximately ten percent only could be attributed to the respondent in the amount of $3,349.50.

The court amended the judgement in favor of the petitioners Dorothy A. Russell

and the Home Insurance Company from $26,661.34 to a total sum of $30,010.84.

Thereafter, the petitioners and respondent noted timely appeals. The Fourth Circuit Court of Appeals affirmed the rulings on July 25, 1985.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE UNITED STATES OF AMERICA MAY NOT CONSTITUTIONALLY DENY A CITIZEN HER RIGHT TO FULL AND ADEQUATE COMPENSATION IN A FEDERAL TORT CLAIMS ACT CASE AS GUARANTEED BY THE FIFTH AMENDMENT BY FAILING TO APPLY STATE LAW

II. THE UNITED STATES OF AMERICA MAY NOT CONSTITUTIONALLY DENY A CITIZEN HER RIGHT TO FULL AND ADEQUATE COMPENSATION IN A FEDERAL TORT CLAIMS CASE AS GUARANTEED BY THE FIFTH AMENDMENT BY ARBITRARILY APPLYING A FORMULA BASED UPON PURE SPECULATION AND NOT SUPPORTED BY ANY EVIDENCE

The court of appeals erred in affirming the ruling of the district court. Maryland law should have been applied. See Massachusetts Bonding & Ins. Co. v.

United States, 352 U.S. 128, 77 S.Ct. 186, 1 L.Ed.2d 189 (1956). See also 28 US.C. § 2674.

If the law of the State of Maryland had been properly applied, there would not have been an apportion of damages by the district court (11 A), and same would have been overturned by the court of appeals.

The common law doctrine with respect to personal injury damages in Maryland tort cases is succinctly stated in Abend v. Sieber, 161 Md. 645, 158 A. 63 (1932):

> That the natural results of a wrongful act are understood to include all damage to the plaintiff of which such act was the efficient cause, though in point in time the damages did not occur until some time after the act done. To such an extent is this principle carried, for the purpose of accomplishing justice, and securing to parties full compensation for wrongs suffered, that the proof of actual damages may extend to all facts which occur and grow out of the original injury, even down to the day of the verdict; the exception to this rule excluding only

> such facts as not only happened since the institution of the action, but which furnish of themselves sufficient ground for a distinct suit. (Emphasis supplied.)

This damage rule was originally applied under Maryland common law to claims other than for personal injury damages, but in 1932 became equally applicable to personal injury cases. Id., 161 Md. at 648, 158 A. at 64.

The petitioner argued before the court of appeals without conceeding the correctness of her 10% award, notwithstanding same, she was entitled to 100% of the damages. Using the analogy - the straw that broke the camel's back - she argued from Laird, Rock & Small v. Campbell, 200 Md. 627, 92 A.2d 380 (1952):

> Whether additional water due to defendant's negligence contributed materially to the damage is not a question of percentage. In both respects the effect of defendant's negligence continued as long as the storm - and afterwards. The

> reasonable inference is that every drop in the cup contributed to the cup overflowing.

Id., 200 Md. 632-633, 92 A.2d at 383. Other, more recent Maryland decisions mandate that a tort-feasor literally takes his victim as he finds him and is bound to accept the frailties with which the plaintiff if afflicted at the time of the accident and therefore cannot escape liability for the full amount of damages because the injury would have been less severe if inflicted upon someone else. See Peterson v. Goodyear Tire, 254 Md. 137 at 142, 254 A.2d 198 at 200-01 (1969); Coca-Cola Bottling Works v. Catron, 186 Md. 156 at 161, 46 A.2d 303 at 305 (1945). See also Turner v. Wash. Sanitary Comm., 221 Md. 494, 158 A.2d 125 (1960); Garbis v. Apatoff, 192 Md. 12, 63 A.2d 307 (1949); Mullen v. Hacker, 187 261, 49 A.2d 640 (1946).

To apportion damages as fashioned by the district court denies petitioners due process of law as guaranteed by the Fifth Amendment. A Maryland trial court would not have been permitted to deal in nice technical calculations to split out or truncate damages. Indeed, there is no reported decision in Maryland which establishes a precedent for what the district court decided and the court of appeals approved.

The district court was clearly erroneous within the mandate of Anderson v. Bessemer City, 105 S.Ct. 1504, 84 L.Ed.2d 518, (1984), when it arbitrarily disregarded the uncontradicted evidence and adopted an arbitrary, speculative and conjectural formula in assessing petitioner's damages. Such is not sanctioned by Maryland law. Mt. Royal Cab Co. v. Dolan, 166

Md. 581 at 584, 171 A. 544 at 855 (1934). The court of appeals strained in violation of Anderson v. Bessemer City, supra, to affirm the district court. The uncontradicted testimony from petitioner's witnesses, an orthopedic specialist and a vocational rehabilitation specialist, was that the combination of petitioner's physical disability and the medical management thereof renders petitioner totally disabled from gainful employment, as a result of the accident. Respondent's single witness, Dr. Johnson, only testified that the preexisting arthritic condition was slightly aggravated. The district court accepted the petitioner's tesimony with regard to disability by tacitly finding she was totally disabled from returning to employment. She had regularly been gainfully employed until the time of the accident

and thereafter totally disabled from gainful employment. The totality of the evidence shows that to award petitioner ten percent is depriving her of her liberty interest and her right to full compensation and therefore is clearly erroneous.

CONCLUSION

Petitioners aver, that in applying the common law of Maryland, no apportionment of damages is permissable. Notwithstanding same, the manner in which the district court invented a formula for splitting out the damages is bottomed on pure speculation and contravenes the overwhelming uncontradicted evidence. The granting of a writ of certiorari is necessary to correct this constitutional injustice.

Respectfully submitted,

David M. Williams
Attorney for Petitioner
113 Court Street
Chestertown, Maryland
21620
(301)778-4096

APPENDIX

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Findings of Fact and Conclusions of Law
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOROTHY A. RUSSELL, Individually and DOROTHY A. RUSSELL, to the use of THE HOME INSURANCE COMPANY and DOROTHY A. RUSSELL and ALBERT G. RUSSELL, as Husband and Wife:	:	
Plaintiffs	:	
v.	:	CIVIL ACTION NO. M-82-333
UNITED STATES OF AMERICA	:	
Defendant	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

1. This is a civil suit for personal injuries sustained as a result of a fall which is alleged to have occurred on September 14, 1979 at Quarters "Z" at the Naval Air Station, Patuxent River, Maryland.

2. Dorothy A. Russell was working on September 14, 1979 as a packer for Hildrup

Transfer and Storage Company. She went to Quarters "Z" at the Patuxent Naval Air Station on that day for the purpose of unpacking household items for Captain and Mrs. Witherspoon, the new tenants of that Quarters. She was, therefore, lawfully on the premises at that time.

3. While Mrs. Russell and her assistant, Mary Beth Mascio, were in the kitchen area of quarters "Z", two men from the Public Works Department of the Naval Air Station arrived to make repairs to the rear door of the Quarters. The two men, probably Edward Johnston and Butler Gray, also moved a newly delivered refrigerator from one side of the storage area adjacent to the kitchen to the other side of said storage area at the request of Mrs. Witherspoon.

4. Although there is a dispute of

fact as to whether anyone was working on the rear door of Quarters "Z" on September 14, 1979, the court has concluded that it is more likely true than not true that Johnston and Gray were present at the time and place testified to by Mrs. Russell, the plaintiff. In answers to interrogatories, the defendant stated that Johnston was working on a door at Quarters "Z" on September 14, 1979. Johnston signed a statement to that effect, PX 13. Although the records of work orders on Quarters "Z" DX 1 and PX 16, do not reflect work on the door at Quarters "Z" on September 14, 1979 an examination of PX 16 shows that there could have been work orders, initiated in early August, but not completed until September, which would not have been reflected on PX 16 or in DX 1.

5. Mrs. Russell walked out of the

back entrance to Quarters "Z" on September 14, 1979 several times before she ultimately fell. On those occasions, there were no obstructions on the step leading from the rear entrance to the sidewalk. On at least one of the prior instances on which Mrs. Russell exited and reentered the rear entrance of Quarters "Z", Johnston and Gray were working on the door.

6. At some time shortly before noon on September 14, 1979, Mrs. Russell attempted to carry empty paper packing crates out of the rear door of Quarters "Z". The empty crates which she was carrying interfered with her ability to observe the conditions of the step on the outside stoop. While exercising reasonable care under the circumstances, and having no reason to believe that there were any obstructions on

the outside stoop, she proceeded out the rear door and slipped on a screwdriver which had been left on the stoop by either Johnston or Gray. Mrs. Russell fell backward against the side of the building known as Quarters "Z" and then fell forward onto her knees on the ground.

7. Mrs. Russell did not receive any cuts or bruises as a result of the fall although she did twist her back and neck and felt discomfort in her left knee.

8. Although Mrs. Witherspoon does not remember it, it is probably true that Mrs. Russell reported to Mrs. Witherspoon, as well as to her co-employee, Mary Beth Mascio, that she had fallen on a tool left by the workmen from the Public Works Department of the Naval Air Station.

9. Mrs. Russell continued working at Quarters "Z" for the rest of the day, un-

packing the household items. She had some pain and discomfort of an increasing intensity as the day wore on.

10. Mrs. Russell did not work on the following two days, being Saturday and Sunday, but she did return to work on the succeeding Monday and Tuesday. Her back, neck and knee bothered her and she stopped working during the day on Tuesday. She saw her family physician, a Dr. Patrick, on September 19, complaining primarily of back pain.

11. Mrs. Russell had extensive pre-existing degenerative arthritis in her knees and lumbar and cervical spine with extensive lumbar spondylosis. She had had some arthritic pains in her knees before the fall in September, 1979.

12. Except for the one visit to Dr. Patrick on September 19, 1979, she did not

seek any treatment for knee, back or neck pain until March 31, 1980, when she was first examined by Dr. Mirza Baig. He found arthritis of the knees, lower lumbar spine and cervical spine, all of which pre-existed the accident of September 14, 1979. An operation was performed on Mrs. Russell's left knee on May 7, 1980 at Calvert Memorial Hospital. During that operation, it was determined that the pre-operative tentative diagnosis of a tear in the knee synovium, thought to have been caused by the fall, did not exist. Instead, pre-existing arthritic changes in the knee were found including a degenerative menisci and osteophytes. The hospital bill was $2,876.19 for the operation. The surgeon's fee was $1,010.00.

13. Dr. Baig continued to see and treat Mrs. Russell for her knee, neck and

back condition until mid-1983. She stopped seeing him because she felt the treatments were not helping the pain which she testified she was experiencing.

14. Dr. J.T.H. Johnson examined Mrs. Russell in July, 1983. His diagnosis was that Mrs. Russell has chronic, degenerative arthritic conditions in her back, neck and knees. His opinion was that those conditions pre-existed the fall in September, 1979 and that any injuries sustained by Mrs. Russell in such a fall were at most a minor aggravating factor.

15. At trial, the court sustained an objection to plaintiff's Exhibit No. 7 on the ground that the records of a hospitalization of Mrs. Russell for treatment of breast cancer in October, 1979 were not relevant to the injuries, if any, sustained as a result of the fall of September, 1979.

The court, having reviewed the records in plaintiff's Exhibit No. 7, now reverses its decision and receives in evidence plaintiff's Exhibit No. 7. There are contained in plaintiff's Exhibit No. 7 several entries which are relevant to the issues of this case. An x-ray report of January 22, 1979, contained in the St. Mary's Hospital records, discloses arthritic changes in the L4-L5 region of the lumbosacral spine and in the T10, 11 and 12 region of the thoracic spine. In addition, the physical examination on Mrs. Russell's admission to St. Mary's Hospital on October 31, 1979 indicates that she had no neck stiffness.

16. Dr. Baig has charged Mrs. Russell a total sum of $5,266.00 for his professional services in treating the knee, back and neck condition of Mrs. Russell up to

June 22, 1983, when she stopped seeing him.

17. At the time of her fall on September 14, 1979, Mrs. Russell was earning approximately $165.00 per week gross. She weighed approximately 220 pounds, and had for a number of years, a condition which aggravated the effects of her pre-existing arthritis. She has not worked since September 19, 1979.

18. Approximately 10% of the currently debilitating condition of the back, neck and left knee of Mrs. Russell can be attributed to the fall of September 14, 1979, the balance of her condition being a direct result of the progressively debilitating effect of her pre-existing arthritis. The current physical condition of Mrs. Russell makes it unlikely that she will ever return to work. She presently would have a work expectancy, if she were

able to work, of approximately 12 years from this date.

19. The plaintiff, Dorothy A. Russell, is married to Albert G. Russell. That marriage has continued since 1962 and is presently in existence. As a result of her injuries, occasioned by the fall on the screwdriver as aforesaid, Dorothy A. Russell and her husband have suffered loss to their marital relationship.

20. A claim for damage was properly placed with the United States Department of the Navy on or about March 10, 1980. All procedural requirements of the Federal Tort Claims Act have been met by the plaintiffs. A denial of the claim of the plaintiffs was issued by the Navy Department on August 19, 1981, and this action was instituted in a timely fashion in this court on February 11, 1982.

21. As a result of the injuries allegedly sustained by Dorothy A. Russell on September 14, 1979, she has received workmen's compensation benefits from her employer which were paid by her employer's workmen's compensation insurer, The Home Insurance Company.

II. Conclusions of Law

1. All procedural requirements of the Federal Tort Claims Act have been met.

2. The Home Insurance Company is subrogated pursuant to Article 101, § 58 of the Annotated Code of Maryland for any claim and cause of action possessed by the said Dorothy A. Russell in the present case.

3. The conduct of the employees of the defendant, Edward Johnston and Butler Gray, on September 14, 1979 constituted negligence.

4. That the plaintiff, Dororthy A. Rusell, was free from contributory negligence, Snider v. Senneville, 267 Md. 552 (1973).

5. That the debilitating painful condition of the neck, back and left knee of Mrs. Russell were caused to the approximate extent of 10% as a proximate result of the negligent conduct of the defendant's employees on or about September 14, 1979.

6. That damage has been sustained in the marital relationship of Dorothy A. Russell and Albert G. Russell, as a direct and proximate result of the negligent conduct of the defendant's employees by virtue of the fact that the physical condition of the said Dorothy A. Russell has been worsened to the extent of approximately 10% by the aforesaid aggravation of her pre-existing arthritic condition.

7. That the work life expectancy of the plaintiff, Dorothy A. Russell, is approximately 12 years, and the discounted present day value of $8,580.00, her annual average earnings, at 10% interest is $58,461.47. Of that amount, the defendant is responsible for 10% or $5,846.15. In addition, the plaintiff, Dorothy A. Russell, is entitled to $10,000.00 for past, present and future pain and suffering, to the sum of $815.19 for past medical expenses, and to the sum of $10,000.00 for impairment of her body.

8. Judgment will be entered in favor of the plaintiff, Dorothy A. Russell, and to the use of The Home Insurance Company, against defendant in the total sum of $26,661.34.

9. Judgment will be entered in favor of the plaintiffs, Dorothy A. Russell and

Albert G. Russell, jointly, against the defendant in the sum of $5,000.00.

It is SO ORDERED this 16th day of November, 1983.

James R. Miller, Jr.
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOROTHY A. RUSSELL, individually	*	
and	*	
DOROTHY A. RUSSELL, to the use of	*	
THE HOME INSURANCE COMPANY	*	
and		
DOROTHY A. RUSSELL,	*	CIVIL ACTION NO.
and ALBERT G. RUSSELL* as husband and wife		M-82-333
	*	
V.		
	*	
UNITED STATES OF AMERICA	*	

* * * * * * * * * * * *** * * * * * * * * *

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law dated November 16, 1983 and filed in the above entitled case, it is

ORDERED and ADJUDGED: THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED in favor of plaintiff DOROTHY A. RUSSELL, and to the use of THE HOME INSURANCE COMPANY, a-

gainst Defendant in ther total sum of Twenty Six Thousand Six Hundred Sixty One Dollars and Thirty Four Cents ($26,661.34); and that Judgment be and the same is hereby entered in favor of Plaintiffs, DOROTHY A. RUSSELL and ALBERT G. RUSSELL, jointly, against the defendant in the sum of Five Thousand Dollars ($5,000.00)_____

Dated at Baltimore, aryland this 21st day of November, 1983.

PAUL R. SCHLITZ,
CLERK

By: Ron Lawson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOROTHY A. RUSSELL :
Individually, and
DOROTHY A. RUSSELL, :
to the use of THE
HOME INSURANCE :
COMPANY and DOROTHY
A. RUSSELL and :
ALBERT G. RUSSELL,
as Husband and Wife:
Plaintiffs

: CIVIL ACTION NO.
v. M-82-333
:

UNITED STATES OF
AMERICA :
Defendant

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the Motion for New Trial, and/or Amendment of Judgment, Pursuant to Civil Rule 59, Federal R. Civ. P., filed by the plaintiffs, the defendant not having responded thereto, and the court being of the opinion that no hearing on said motion is required (Local Rule 6(E)), and the court having concluded that no new trial is required and that, with one ex-

ception, the Findings of Fact, Conclusions of Law, and Judgment heretofore entered were correct under the evidence presented to the court, but the court having further concluded that it was in error in inadvertently omitting a finding as to alleged lost wages between the time of the accident on September 14, 1979 and the date of the trial on October 27, 1983, the court enters herewith supplemental findings of fact and conclusions of law as follows:

I. Supplemental Findings of Fact

1. the plaintiff first saw a doctor concerning her lumbar spine, subsequent to the accident, on September 19, 1979. She was found to have extensive pre-existing spondylosis with osteoarthritis of the lumbar spine. This condition pre-existed the accident, as is shown, among other things, by an x-ray report of January 22,

1979, contained in the St. Mary's Hospital record.

2. Her neck stiffness and knee problems, resulting from a natural progression of her pre-existing arthritic condition, did not develop to a substantial degree until after her discharge from St. Mary's Hospital on November 12, 1979 for removal of a cancerous breast.

3. On October 31, 1979, the plaintiff was admitted to St. Mary's Hospital for examination and ultimate removal of her cancerous breast.

4. The injuries sustained by the plaintiff from the fall on September 14, 1979, contributed to her inability to work for approximately four weeks prior to her hospitalization for the breast operation and, thereafter, contributed to her inability to work for the period beginning approximately January 1, 1980. The rest

of the time that she was unable to work prior to January 1, 1980 was a direct result of her breast condition, and not as a result of any injuries sustained in the accident.

5. The plaintiff lost approximately 203 weeks of work as a result of physical conditions contributed to by the injuries sustained in the fall on September 14, 1979. If she had worked during that period of time, she would have received a total income of $33,495.00. Of that amount, approximatley 10% was caused by the injuries sustained on September 14, 1979.

II. Supplemental Conclusions of Law

1. In addition to the damages sustained by the plaintiff as set out in paragraphs 7 and 8 of the original Conclusions of Law, the plaintiff, Dorothy

A. Russell, to her own use and to the use of The Home Insurance Company, is entitled to recover the sum of $3,349.50 against the defendant.

2. The judgment, heretofore entered in favor of the plaintiff, Dorothy A. Russell, and to the use of The Home Insurance Company, against the defendant will be amended from the total sum of $26,661.34 to the total sum of $30,010.84.

It is SO ORDERED this 22nd day of December, 1983.

James R. Miller, Jr.
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOROTHY A. RUSSELL, Individually and DOROTHY A. RUSSELL, to the use of THE HOME INSURANCE COMPANY and DOROTHY A. RUSSELL and ALBERT G. RUSSELL, as Husband and Wife	*	
Plaintiffs	*	CIVIL ACTION NO. M-82-333
V.	*	
UNITED STATES OF AMERICA	*	
Defendant	*	

* * * * * * * * * * * *** * * * * * * * * * *

AMENDED JUDGMENT

In accordance with the Supplemental Findings of fact and Conclusions of Law dated December 22, 1983 (Paper No. 21) and filed in the above entitled case, it is

ORDERED and ADJUDGED: the Judgment heretofore entered in favor of the Plaintiff, Dorothy A. Russell, and to the use of The Home Insurance Company, against the

defendant be and is hereby AMENDED from the total sum of twenty Six Thousand Six Hundred Sixty One Dollars and Thirty Four Cents ($26,661.34) to the total sum of Thirty Thousand Ten Dollars and Eighty Four Cents ($30,010.84).

Dated at Baltimore, Maryland, this 4th day of January, 1984.

PAUL R. SCHLITZ, CLERK

By: Ron Lawson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 84-1131 (L)

Dorothy A. Russell, individually and Dorothy A. Russell, to the use of The Home Insurance Company and Dorothy A. Russell and Albert G. Russell, as husband and wife,

Appellants,

versus

United States of America,

Appellees.

No. 84-1263

Dorothy A. Russell, individually and Dorothy A. Russell, to the use of The Home Insurance Company, and Dorothy A. Russell and Albert G. Russell as husband and wife,

Appellees,

versus

United States of America,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge. (A/A 82-333)

Argued: May 8, 1985 Decided: July 25, 1985

Before MURNAGHAN, ERVIN and SNEEDEN,

Circuit Judges

David A. Williams for Appellant; Robert B. Green, Assistant United States Attorney; (J. Frederick Motz, United States Attorney on brief) for Appellee.

ERVIN, Circuit Judge:

The appellants, Dorothy A. Russell, individually and to the use of the Home Insurance Company, and Albert G. Russell, her husband, appeal from the district court's entry of judgment in favor of Dorothy Russell and the Home Insurance Company for $30,010.84 and in favor of Dorothy and Albert Russell for $5,000.00 in their personal injury suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671.[1] The Russells assert on appeal that the

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1 After this case was tried before the district court, judgment was entered in favor of Dorothy Russell and the Home Insurance Company in the amount of $26,661.34 for the physical injuries Mrs. Russell sustained as a direct result of the government's negligence. Judgment was also entered in favor of Dorothy and Albert Russell as husband and wife in the amount of $5,000.00 for the damages sustained in their marital relationship as a direct re-

(footnote continued)

district court erred in its assessment of damages against the government in this case. They argue 1) that the district court erroneously concluded that only 10% of Mrs. Russell's physical injuries were proximately caused by the negligence of the United States and 2) that such an assessment was improper under Maryland law. The United States has cross-appealed asserting that the district court erroneously concluded that Mrs. Russell was not

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(footnote continued)

sult of the government's negligence. Subsequently, in ruling upon the appellants' motion for a new trial and an amended judgment, the district court ordered the judgment entered in favor of Mrs. Russell and the Home Insurance Company increased to $30,010.84. The award to the Russells as husband and wife was not ordered increased. It is from the amended judgment that the appellants now appeal.

contributorily negligent in this case and therefore was not barred from recovery under Maryland tort law. Because we believe 1) that the district court was not clearly erroneous in its determination that 10% of Mrs. Russell's total incapacity was proximately caused by the negligence of the United States and 2) that the district court properly concluded that Mrs. Russell was not contributorily negligent in this case under Maryland law, we affirm the judgment of the district court.

I.

On September 14, 1979, Dorothy Russell was working as a packer for Wildrup Transfer and storage Company at the Patuxent River Naval Air Station in St. Mary's County, Maryland. Her job that day was to unpack household items for a newly arrived Navy Captain and his wife at Quarters Z on

the base. While Russell and her assistant Mary Beth Mascio, were working in the kitchen area of the hosue, two men from the Public Works Department of the Naval Air Station arrived to make repairs to the dwelling's rear door. While the two men were repairing the rear door, Russell walked in and out of the back entrance to the house several times. At no time during her trips through the back door did she observe any obstructions on the single step leading from the rear entrance to the sidewalk.

After the two men repaired the rear door, they departed. Soon thereafter, Russell attempted to carry several empty packing boxes out the back entrance. Because she held the boxes chest-high, she was unable to observe the condition of the step leading from the rear entrance to the

sidewalk. Consequently, she failed to see a screwdriver left on that step by one of the repairment from the Public Works Department. Russell slipped on the screwdriver, fell backward against the side of the house and then fell forward onto her knees on the ground.

Although she felt some pain and discomfort in her neck, back and knees as a result of the fall, Russell continued to work at Quarters Z the rest of the day. She did not work the next two days, however, since they were Saturday and Sunday, but she did return to work on the following Monday and Tuesday. Nevertheless, because the pain in her back intensified during the day on Tuesday, she left work and saw her family physician. The doctor treated Russell's back pain until she was examined by another physician, Dr. Mirza

Baig, on March 31, 1980.

At that time, Dr. Baig discovered that Russell suffered from degenerative arthritis in her knees, lower lumbar spine and cervical spine with extensive lumbar spondylosis. In his opinion, these conditions existed prior to Russell's September 14 fall. However, he did conclude that these conditions were aggravated by the fall. Because Dr. Baig suspected that the fall might have torn the synovium in Russell's left knee, he operated on May 7, 1980. During the operation, he discovered that the synovium had not been torn. Instead, he found further evidence of arthritic changes in the knee including degenerated menisci and osteophyte formation which he concluded had existed prior to the fall. Dr. Baig continued to treat Russell for her neck, knee and back pain

until June 22, 1983, at which time Russell terminated the treatment, complaining that it was not effectively reducing her pain.

Soon thereafter, Russell consulted Dr. J.T.H. Johnson who examined her in July of 1983. He concluded that Russell had chronic, degenerative arthritic conditions in her back,neck and knees which existed prior to her fall. It was his opinion that these chronic arthritic problems were "common in heavy-set individuals of her age."[2] As a result, Dr. Johnson concluded that, "at most [the fall] was a

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2 Russell testifies that in September, 1979, she weighed 220 pounds, stood 5'1 ½" tall and was 48 years old. When Dr. Johnson examined her in 1983, she was 52 years old, and he described her as "significantly overwight." (JA 418)

minor aggravating factor" in Russell's overall condition. (JA 419).

Russell filed a claim with the United States Navy for her damages on March 10, 1980. Her claim was denied on August 18, 1981.[3] Subsequently, appellants filed this action in the district court below. After considering the medical tesitmony and all the evidence in the records as a

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3 Russell has received worker's compensation benefits from her employer as a result of the injuries sustained in her fall on September 14, 1979. These benefits were paid by her empoloyer's worker's compensation insurer, the Home Insurance Company. Consequently, the Home Insurance Company is subrogated for any claim and cause of action possessed by Dorothy Russell in this case pursuant to Md. Ann. Code art. 101 § 58 (1957).

whole, the district court concluded that "[a]pproximately 10% of the currently debilitating condition of the back, neck and left knee of Mrs. Russell can be attributed to the fall of September 14, 1979, the balance of her condition being a direct result of the progressivley debilitating effect of the pre-existing arthritis." (JA 39-40). The court then ordered the government to pay 10% of the actual damages it found Russell had sustained. The resulting awards were $30,010.84 to Russell and the Home Insurance Company and $5,000.00 to Mr. and Mrs. Russell, as husband and wife.

II.

The Russells' first argument on appeal is that the district court improperly applied comparative negligence principles in determining their damage award in this

case. The appellants correctly note that under Maryland law contributory negligence is a complete defense to a suit in tort. Harrison v. Montgomery County Board of Education, 295 Md. 442, 456 A.2d 894 (1983); Moodie v. Santoni, 292 Md. 582, 441, A.2d 323 (1982); Irwin v. Spriggs, 6 Gill 200 (1847). Comparative negligence principles do not apply. Consequently, a plaintiff's negligence is not to be compared with a defendant's fault. Harrison, 295 Md. at 462-463, 456 A.2d at 904-905. Nevertheless, the Russells contend that this is precisely what the district court did in this case by ordering the United States to pay 10% of Mrs. Russell's total damages. We disagree.

The district court did not, as the appellant's assert, improperly apportion damages to defeat the general common law

rule that a tortfeasor takes his victim as he finds him and must accept the human frailties with which a person is afflicted. See Prosser, The Law of Torts 261-262 (1971); see also Coca-Cola Bottling Works v. Catron, 186 Md. 156, 161 A.2d 303, 305 (1946). Rather, the district court simply made a judgment regarding proximate cause. After hearing all the evidence, the court concluded that the government's negligence was the proximate cause of only a small portion of Russell's total damages. He determined that 90% of Russell's injuries did not result from nor were proximately caused by her fall. He concluded that these injuries were the result of her prior arthritic condition. Russell would have suffered these injuries whether she had fallen or not. Therefore, the district court properly applied to the

the facts of this case the Maryland rule of law that

> in an action for personal injuries caused by the negligence of the defendants, the plaintiff may recover not only for the consequences which have actually and naturally resulted from the tort, but also for those which may certainly or reasonably and probably result therefrom as proximate consequences, but not for consequences which are speculative or conjectural.

Adams v. Benson, 208 Md. 261, 270-271, 117 A.2d 881, 885 (1955) (citing Mt. Royal Cab Cab v. Dolan, 166 Md. 581, 171 A. 854 (1934)). The district court properly awarded Russell damages for the injuries proximately caused by the government's negligence.

III.

Next, the appellants argue that the district court's conclusion that only 10% of Russell's injuries were proximately

caused by the government's negligence is reversible error. We cannot agree.

As recently reiterated by the Supreme Court in Anderson v. City of Bessemer, 105 S.Ct. 1504 (1985), we may reverse the district court's findings of fact only if we conclude that they are clearly erroneous. Although it would facilitate our review had the district court more clearly elaborated its justification for the finding that 10% of Russell's injuries were proximately caused by the government's negligence, we conclude upon a review of the medical evidence that this finding is supported by the evidence in the reocrd and is not clearly erroneous.

Dr. J.T.H. Johnson, after examining Russell at the request of the government, concluded that Russell had 30-35% permanent disability of her left knee, 0% dis-

ability of her neck, and 15-20% permanent partial disability of her lower back. (JA 404-405). However, Dr. Johnson testified that these percentage disability figures were "substantially the same" both before and after the fall. (JA 405). It was his opinion that the fall "at most [was] a minor aggravating factor" to Russell's various physical ailments. (JA 419).

Dr. Mirza Baig, Russell's treating physician, never testified to a specific percentage disability resulting from the fall. The thrust of his testimony, however, was that Russell suffered more pain as a result of the fall than she ordinarily would have from her degenerative arthritic condition alone.

The medical testimony adduced at trial, therefore, indicates that the fall

was not responsible for the wide array of physical maladies Russell later experienced. Rather, the fall, by causing Russell more pain and perhaps by merely aggravating a previously existing medical condition, was only the proximate cause of a small portion of Mrs. Russell's physical problems. As a result, we conclude that the district court's findings that 10% of Russell's injuries were proximately caused by her fall in September of 1979 is not clearly erroneous in light of all the medical evidence in the record when viewed as a whole.

IV.

Finally, the appellants argue that the district court erred by not awarding damages for the mastectomy Russell claims was necessitated by a blow she received in the fall. This argument is totally with-

out merit.

Several weeks after her fall in September, 1979, Russell discovered a cancerous lump in her breast. A mastectomy was performed in late October, 1979. However, no medical evidence established any causal connection between Russell's September, 1979 fall and her breast cancer. Even Dr. Baig, Russell's treating physician from March 31, 1980 until June 22, 1983, testified that he did not believe the fall had any causal connection to Russell's mastectomy. (JA 370). Accordingly, the district court did not err in refusing to award Russell damages stemming from her breast cancer.

V.

On cross-appeal, the government asserts that the district court's finding that Russell was not contributorily negli-

gent is a reversible error.[4] We disagree.

The government argues that under Maryland case law Russell's conduct constitutes contributory negligence. The significant facts on this issue are not in dispute. Russell testified that she carried various items down the stairs several times before slipping on the screwdriver on her thrid or fourth trip. She admitted at trial that, although she had looked down at the steps on her previous trips, she did not look down at the steps on the final trip because she was carrying a package chest-high which blocked her

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2 As we have noted above, if Russell were found to have been contributorily negligent, she would not be entitled to any recovery wheatsoever under Maryland law. Harrison v. Montgomery County Board of Education, 295 Md. 442, 456 A.2d 894 (1983).

view. The district court relied on the Maryland Court of Appeals' decision in Snider v. Senneville, 267 Md. 552, 298 A.2d 175 (1973) to determine that Russell's conduct did not constitute contributory negligence under Maryland law.

Snider is factually very similar to the instant case, and the government's attempts to distinguish it away are unpersuasive. In Snider, a furniture repairman arrived at Mrs. Snider's home to mend certain furniture. After he placed his heavy toolbox on the living room floor near the dining room talbe, he occupied himself with his work. Snider testified that she recalled seeing him carry the toolbox into the house but did not see him place it on the floor. Soon thereafter, Snider attemtped to carry a silver tray, eighteen inches wide, chest-high

from the dining room table to the living room. she did not look down and subsequently tripped over the toolbox, sustaining various injuries. The Maryland Court of Appeals determined that it was within the province of the jury in this situation to decide whether Snider, "in the exercise of reasonable care for her own safety, should have looked, and thus should have seen the toolbox." Snider, 267 Md. at 557, 298 A.2d at 178. The court held that she was not contributorily negligent on these facts as a matter of law. The issue was one for the jury.

In the instant case, Russel had walked up and down the steps several times without indicent. She was aware that workmen had been in the area, but she also knew that they had left. Russell came out

on her fateful trip with a package held chest-high, and did not look down. Failing to see the screwdriver, she slipped and fell. This case is factually nearly identical to Snider's carrying a silver tray in familiar surroundings without looking down and subsequently falling over a toolbox. Consequently, the district court in the instant case was free to conclude that Russell was not contributorily negligent on the facts of this case. Even though reasonable minds could differ on whether Russell was contributorily negligent, sufficient evidence was adduced at trial to support the district court's conclusion that she was not. See Snider, 267 Md. at 557, 298 A.2d at 178.[5]

5 The cases cited by the government are clearly distinguishable. Mashon v. Fino's 261 Md. 350, 276 A.2d 191 (1971) involved a contibutorily negligent plaintiff walking "blindly"in a "strange environment." Here

(footnote continued)

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

(footnote continued)
familiar with the steps after several trips so that she was not in a "strange environment" any longer. Similarly, Rooney v. Statewide Plumbing, 265 Md. 559, 290 A.2d 496 (1972) involved a situation in which the contributorily negligent plaintiff had reason to know that a grate had been removed in the hallway and that a large hole remained. Russell knew the workmen had been working on the rear door at the quarters but could not be expected to aniticpate that one would leave his screwdriver behind on the very step she had had walked on unobstructed only minutes before. Finally, Hynes v. Hutzler Brothers Co., 261 Md. 345, 276 A.2d 99 (1971) involved a contributorily negligent plaintiff who walked into the defendant's employee in a department store without looking and suffered injury. the duty to pay attention to where one is walking is clearly much greater in a downtown department store than it is for someone who is carrying a large box over previously unobstructed steps.